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Supreme Court of the United States

DOCKET YEAR, 1881

G. S. NICHOLAS & CO. ET AL.

Plaintiffs

THE UNITED STATES

ALEX. D. BRADY & CO. ET AL.

Plaintiffs

THE UNITED STATES

7 8 6

No 5

7 8 6

RETURNED FOR WANT OF CERTIFICATE TO THE UNITED STATES COURT OF CUSTOMS APPEALS AND EXCISE DISTRICT

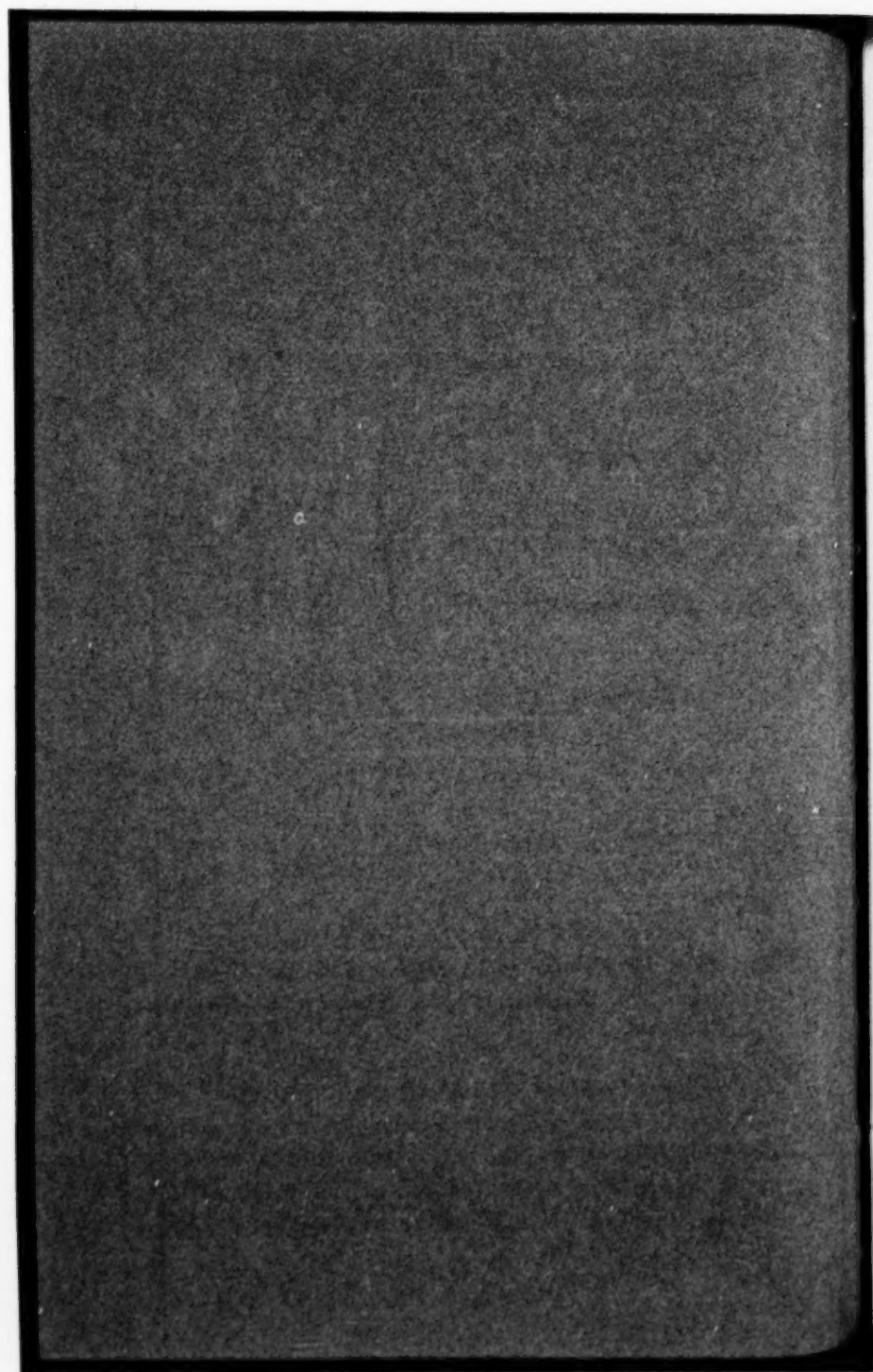
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G. S. NICHOLAS & CO. ET AL.



IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1916.

G. S. NICHOLAS & CO., ET AL.,
Petitioners,

VS.

THE UNITED STATES.

ALEX. D. SHAW & CO., ET AL.,
Petitioners,

VS.

THE UNITED STATES.

**Petition for Writs of Certiorari to the Court of
Customs Appeals, and Brief in Support
Thereof.**

The petitioners pray for writs of *certiorari* to the Court of Customs Appeals to review the decision and judgment of that Court rendered on the 12th day of May, 1916, in the above entitled cases, affirming the decision of the Board of U. S. General Appraisers (Rec., 20). The mandate upon decision

was issued September 18, 1916, by the Court of Customs Appeals.

This petition is filed pursuant to the Act of August 22, 1914, amending Sec. 195, Act of March 3, 1911 (63d Cong., 2d Sess., Ch. 267), which provides :

“ An act to amend section one hundred and ninety-five of the Act entitled ‘ An Act to codify, revise, and amend the laws relating to the judiciary,’ approved March third, nineteen hundred and eleven.

“ Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one hundred and ninety-five of an Act entitled ‘ An Act to codify, revise, and amend the laws relating to the judiciary,’ approved March third, nineteen hundred and eleven, be, and hereby is, amended so as to read as follows :

“ SEC. 195. That the Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues ; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases : Provided, however, That in any case in which the judgment or decree of the Court of Customs Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court, upon the petition of either party, filed within sixty days next after the issue by the Court of Customs Appeals of its mandate upon decision, in any case in which there is drawn in question the construction of the Constitution of the United States, or any part thereof, or of any treaty made pursuant thereto, or

in any other case *when the Attorney General of the United States shall, before the decision of the Court of Customs Appeals is rendered, file with the court a certificate to the effect that the case is of such importance as to render expedient its review by the Supreme Court,* to require, by *certiorari* or otherwise, such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court: And provided further, That this Act shall not apply to any case involving only the construction of section one, or any portion thereof, of an Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August fifth, nineteen hundred and nine, nor to any case involving the construction of section two of an Act entitled 'An Act to promote reciprocal trade relations with the Dominion of Canada, and for other purposes,' approved July twenty-sixth, nineteen hundred and eleven." (Italics ours).

Approved, August 22, 1914.

The Attorney General on January 26, 1916, in accordance with the foregoing statute, filed this certificate with the Court of Customs Appeals, to-wit:

" IN THE UNITED STATES COURT OF CUSTOMS APPEALS.

G. S. NICHOLAS & COMPANY

ET AL.,

v.

THE UNITED STATES.

No. 1594.

CERTIFICATE OF THE ATTORNEY GENERAL.

In pursuance of the Act entitled "An Act to amend section 195 of the Act entitled 'An Act to codify, revise

and amend the laws relating to the judiciary, approved March 3, 1911,' " approved August 22, 1914, I, T. W. Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1594, G. S. Nicholas & Company *et al.* v. The United States," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 22nd day of January, 1916.

Filed January 26, 1916.

U. S. Ct. Cust. Appls.

T. W. GREGORY,
Attorney General."

A similar certificate was filed in the Shaw case, suit number 1602.

We ask for a writ of *certiorari* because the decree of the Court of Customs Appeals is made final by statute; this petition is filed within the prescribed sixty days; the case involves international commercial relations between the United States and Great Britain and the practice of the Treasury Department relating thereto under statutes which may involve treaty rights; and because the case is of such importance as to render expedient its review by this Court as certified by the Attorney General of the United States.

The British Government has an excise system peculiar to itself with respect to spirits. An excise or internal revenue tax is not imposed upon spirits as such, *but only upon potable spirits when entering into domestic consumption*. The Government officially recognizes that the special precautions taken by it to prevent such spirits escaping the duty results in the imposition upon the manufacturer of statutory restrictions in connection with his plant and method of manufacture, which considerably enhance his natural costs of production (Exhibit 6, Annex A, Rec., 37).

To compensate the manufacturer, at least in part, for these

extra expenses, which are no part of the normal cost of manufacture, and which the Government for its own ends requires him to incur, the British Government has for over half a century made an allowance under certain contingencies or in certain cases fixed per proof gallon upon plain and compounded spirits. At the present time these allowances amount to 3d. per gallon upon plain and 5d. per gallon upon compounded spirits. They are not always made when spirits are destined for exportation and are not limited to export spirits, but they may or may not include such spirits.

The question presented for determination is : Does the British Government pay or bestow directly or indirectly any bounty or grant upon the exportation of spirits within the meaning of Section 4, Paragraph E, Tariff act of October 3, 1913. Paragraph E provides as follows :

" That whenever any country, dependency, colony, province, or other political subdivision of government shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by re-manufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall

make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties."

What has been called the countervailing duty section of the tariff was incorporated in our tariff law in 1897. Paragraph E of the existing law is virtually the same as section 5 of the Act of July 24, 1897. During all the years that the countervailing duty provision has been on the statute books, no contention was ever made prior to 1911 that this allowance, which has been a part of the British fiscal system since 1860, was viewed in any sense by our Government as an export bounty. In that year, after a thorough investigation of the whole situation by our Treasury Department, the conclusion was finally reached that the allowances were not bounties or grants within the meaning of Section 6 of the Tariff Act of August 5, 1909. See Treasury Decision 31490 of April 18, 1911, revoking T. D. 31229 of January 21, 1911 :

" Upon a further consideration of the laws of the United Kingdom of Great Britain and Ireland relating to the *allowance* granted upon exported British spirits, and in view of additional laws and facts in relation thereto submitted by officers of the said Government, the department has reached the conclusion that the said *allowance* is not a bounty or grant within the meaning of section 6 of the tariff act of August 5, 1909. Consequently no countervailing duty will be assessed upon British spirits imported into the United States, T. D. 31229 is hereby revoked."

T. D. 31490.

The reasons in support of these conclusions are set forth in a departmental memorandum dated April 17, 1911 which is a part of Exhibit 9 (R., 62) in this case. The present assessment under the law of 1913 is by virtue of T. D. 34466 dated May 25, 1914.

We have, therefore, a long continued executive practice in this case extending over many years, which was ratified and reaffirmed by the Treasury Department in 1911. Fostered by that practice the trade affected has grown up. The countervailing duty provision (Section 4, Paragraph E) of the law of 1913, which in no way differs from Section 6 of the law of 1909, was enacted by Congress in the light of the executive interpretation placed upon the law of 1909. It must be presumed that Congress re-enacted Paragraph E with full knowledge of the rule of construction set forth in T. D. 31490. The familiar rule of the legal presumption flowing from this state of affairs, *i. e.*, long continued executive practice and legislative sanction is therefore in full play in this case. *United States vs. Post*, 3 Ct. Cust. Appls., 260. *Brennan vs. United States*, 136 Fed. Rep., 743. *U. S. vs. Midwest Oil Co.*, 236 U. S., 459.

In the latter case there was a question as to the right of the President to withdraw public lands from private acquisition without special authorization by Congress after Congress had opened them to occupation. This Court said (*U. S. vs. Midwest Oil Co.*, 236 U. S., 459, 472) :

"It may be argued that while these facts and rulings prove a usage, they do not establish its validity, but government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long continued action of the executive department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power weight shall be given to the usage itself, even when the validity of the practice is the subject of investigation."

"This principle, recognized in every jurisdiction, was first applied by this court in the often cited case of *Stuart vs. Laird*, 1 Cranch, 299, 309." (*Italics ours*).

The British Law and the Reason for It.

The laws applicable are set forth in Exhibit 1 (Enc., VI) as follows :

- (a) August 26, 1900 (22 and 24 Vict. Cap. 220) ;
- (b) Section 12 of Chapter 90 of 26 and 27 Vict. 1903 ;
- (c) August 26, 1900 (43 and 44 Vict.), usually cited as the " Spirits Act of 1900 " ;
- (d) Sections 16 and 17 of 44 and 45 Vict. Cap. 23, 1901 ;
- (e) August 4, 1905 (29 and 30 Vict. Cap. 22) ;
- (f) August 26, 1900 (22 and 24 Vict. Cap. 43), usually cited as the " Revenue Act of 1900 " ;
- (g) May 30, 1905 (29 Vict. Cap. 33) ;
- (h) July 22, 1902 (3d Ed. VII, Cap. 7) ;
- (i) August 4, 1906 (4th Ed. VII, Cap. 30).

When the question as to whether the British allowances did or did not constitute a bounty or grant, was the subject of investigation by our Government in 1911, Ambassador Bryce transmitted to Secretary of State Lane, a report of the British Board of Customs & Excise in which it is stated (Exhibit 6, Annex A, Enc. VI) :

" These allowances have formed an essential feature of our system of taxing spirits ever since 1800, when, in consequence of the Cordon treaty with France, the former prohibitive duties were abolished. It is significant that the adoption of the allowances as part of our fiscal system, as far from being associated with any idea of a bounty, took place at the very time when free-trade principles secured the most complete recognition in this country.

" The object of the allowances originally was, and still is, not to place the manufacturer of British spirit in a position of advantage, as compared with his foreign competitor in the foreign market, but to pro-

most like them being placed in a collection of American songs is that marked as a result of the supposition which the very Government, for the very same reason, has to make in the process of manufacture.

"The duty on British spirits is very heavy, and renders the economy of special provisions being taken to prevent any spirit among the duty." * * *

Section IV. of the original Act of August 22, 1882, thus stated its object in a preamble:

"In consideration of the laws and regulations enacted by British legislation in the Distillation and Rectification of Spirits in the United Kingdom." * * *

The objection mentioned in the House of Commons before the law was passed that its intention to protect a limited allowance "is a consequence of the disadvantages under which the British Distiller labored" (Hansard's Parliamentary Debates, 3rd Series, Volume 122, page 1735-7).

These allowances clearly are not known or given to that extent as object. Wharton's Law Dictionary, 11th edition, states that "Distillation here has entirely abolished in England."

These Allowances Are Not Given Paid on the Rectification of British Spirits. They Are Also Paid When Certain British Spirits Are Made Domestic Consumption. Neither is it True That All British Spirits Were Imported But the Allowance; Only Those Which Are Withdrawn as a Certain Specified Way Out of.

Now does the passage of the original Act of 1882, thus far have a progressive purpose manifest in making the matter one to such spirit as go into domestic public consumption.

All spirits not so destined, whether shipped abroad or used at home, escape the tax and, in harmony with the policy of the law, all such spirits not only escape the tax but get the allowance, thus demonstrating that the allowance is not in the nature of a bounty on exportation, but is solely a compensation for extra costs of manufacture which the distiller has to incur by reason of a complicated tax machinery designed to affect only such British spirits as are potably consumed at home. Allowances are paid :

(a) When compounded spirits are "used in a customs warehouse for fortifying wines or for any other purpose to which foreign or colonial spirits may be applied under the laws or regulations of the customs" (See Section 12 of Chapter 98 of 28 and 29 Vict., 1865).

(b) When British spirits are used in the United Kingdom for industrial purposes (See Section 8 of the Finance Act, 1902, and Section 1 of the Revenue Act, 1906).

(c) When British spirits are used at universities and colleges. The statutes just cited have been held to authorize allowances in the case of such spirits.

(d) When British spirits are used as naval or ships stores.

The Board seems to be of the opinion that a "very small proportion" of British spirits not exported receives the allowance, the nature of which is here in controversy. Obviously, the quantity of spirits used in a country like Great Britain for industrial purposes must be something more than "a very small proportion" of the whole domestic consumption. A very substantial proportion of the spirits which go into home consumption not only escape the excise tax altogether, but also get the allowance.

Not all British spirits when exported get the allowance. The following different kinds of warehouses are defined in Section 3 of the Spirits Act of 1880 :

" 'Distiller's warehouse' means an approved warehouse on the premises of a distiller ;

“ ‘Excise warehouse’ means a warehouse approved or provided by the Commissioners as a general warehouse for the deposit of spirits ;

“ ‘Customs warehouse’ means a warehouse approved or provided by the Commissioners of Customs for the deposit of spirits.”

Spirits Act, 1880, Sec. III.

See, also, in this connection Sections 49, 50 and 54, Spirits Act of 1880. In addition to this, by Section 13 of the same Act a distiller's Spirit Store, is made mandatory :

“ 13. (1) Every distiller must, to the satisfaction of the Commissioners, provide a spirit store and cause it to be properly secured.

“ (2) The spirit store must be kept locked by the officer in charge of the distillery at all times except when he is in attendance.”

We have, therefore, (1) A distiller's warehouse ; (2) an excise general warehouse ; (3) a customs or crown excise warehouse ; (4) a distiller's spirit store. It is well known that spirits may be exported from a distiller's warehouse or from a spirit store. It is expressly provided that they may be exported from a distiller's warehouse (See Section 81, Spirits Act, 1880). But the allowances are only paid when the spirits are exported from an *excise or customs warehouse* (See Section 3, Act of 1885). Manifestly, the mere act of exportation does not entitle the distiller or shipper to the allowance. He must route his spirits through one of two prescribed warehouses if he desires to obtain it. The allowance, therefore, may or may not be extended to spirits when exported.

The Legal Nature of a Bounty or Grant Within the Meaning and Scope of the Tariff Law.

A little reflection will show that the phrase “bounty or grant” as used in section 4, paragraph E of the present tariff law is of limited scope and application. The phrase certainly

was not used in its most comprehensive sense. A protective tariff, for example, may confer an indirect bounty upon its beneficiaries, and yet nobody would pretend that *legally* a protective duty fell within the bounties or grants penalized by Congress.

Section 4, Paragraph O, of the Tariff Act of 1913, provides :

“ That upon the exportation of articles manufactured or produced in the United States by the use of imported merchandise or materials upon which customs duties have been paid, the full amount of such duties paid upon the quantity of materials used in the manufacture or production of the exported product shall be refunded as drawback, less one per centum of such duties.”

This is known as the drawback section of the law and the Treasury decisions every week are filled with the granting of *allowances* on account of drawback. The original drawback provision is found in Section 3 of the first tariff act of July 4, 1789 (1st U. S. Stat., 27). The first distinctive internal revenue act passed by Congress on March 3, 1791 (1st U. S. Stat., 210), contained this provision.

“ Allowance to Exporters.

And for the encouragement of the export trade of the United States.”

“ SEC. 51. Be it further enacted, That if any of the said spirits (whereupon any of the duties imposed by this act shall have been paid or secured to be paid) shall, after the last day of June next, be exported from the United States to any foreign port or place, there shall be an allowance to the exporter or exporters thereof, by way of drawback, equal to the duties thereupon, according to the rates in each case by this act imposed, deducting therefrom half a cent per gallon, and adding to the *allowance* upon spirits distilled within the United States, from *molasses*, which shall be

so exported, three cents per gallon, as an equivalent for the duty laid upon molasses by the said act, making further provision for the payment of the debts of the United States: Provided always, That the said allowance shall not be made, unless the said exporter or exporters shall observe the regulations hereinafter prescribed: And provided further, That nothing herein contained shall be construed to alter the provisions in the said former act, concerning drawbacks or allowances, in nature thereof, upon spirits imported prior to the first day of July next."

A definition which distinguishes between a drawback and a bounty is cited in part by Mr. Chief Justice FULLER in the *Passavant* case, 169 U. S., page 23.

"*Drawback*, a term used in commerce to signify the remitting or paying back upon the exportation of a commodity of the duties previously paid on it.

"A drawback is a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all. It differs in this from a bounty, that the latter enables a commodity to be sold for *less* than its natural cost, whereas a drawback enables it to be sold exactly at its natural cost. Were it not for the system of drawbacks it would be impossible, unless when a country enjoyed some very peculiar facilities of production, to export any commodity that was more heavily taxed at home than abroad. But the drawback obviates this difficulty, and enables merchants to export commodities loaded at home with heavy duties, and to sell them in the foreign markets on the same terms as those fetched from countries where they are not taxed."

Wharton's Law Lexicon, 11th Ed.

Other authorities recognize the same distinction.

"Ency. Brit., 11th Ed.:

"* * * The object of a drawback is to enable commodities which are subject to taxation to be ex-

ported and sold in a foreign country on the same terms as goods from countries where they are untaxed. *It differs from a bounty in that the latter enables commodities to be sold abroad at less than their cost price ;*

* * *

" Bouvier, Ed. 1914, 3rd Rev. :

" An allowance made by the government to merchants on the *re-exportation* of certain imported goods liable to duty which in some cases consists of the whole, in others of a part, of the duties which had been paid on importation. *Goods can thus be sold in a foreign market at their natural cost in the home market."*

" Black's Law Dict., Ed. 1891 (Referring to drawback) :

" *It differs from a bounty in this, that the latter enables a commodity to be sold for less than its natural cost, whereas a drawback enables it to be sold exactly at its natural cost."*

If it be proper to free goods from every form of excise tax so that they may enter the foreign market just as if no excise tax had been imposed at all, without incurring the penalty of our bounty statutes, then manifestly we have no concern with the amount of the excise tax, or what constitutes it. All this may very well vary in different countries according to the peculiar conditions and necessities of each country. Our inquiry is : Does the thing complained of, called in this instance an *allowance*, do anything more than put the product affected in the world's market free of all excise burden ?

In the case of *United States vs. Hill Bros.*, 107 Fed. Rep., 107, cited in the opinion below, the Circuit Court of Appeals did not hold that the mere remission of the excise tax by Holland constituted a bounty, but that an actual bounty on production paid by the Netherlands Government, which under the operation of its laws the producer retained upon exportation, did amount to a bounty and to this extent *only* was a countervailing duty imposed. A clear statement of what the

facts were is found in the Circuit Court decision (99 Fed. Rep., 425).

In *Downs vs. United States*, 187 U. S., 496 (the Russian Sugar Bounty case), also cited in the opinion below, that this Court did not hold that the remission of an excise tax on exported sugar constituted a bounty. Although an excise tax, imposed upon the production of Russian sugar, had been remitted in that case, the amount of this excise tax was not added as a countervailing duty and the Government did not contend that it constituted a bounty. Neither did this Court so hold. The case is somewhat complicated and requires careful study. It appears that the Russian Government annually determined the total quantity of domestic sugar needed for home consumption and controlled both the production and the price. A certain normal and fixed amount of production was allotted to each factory, called free sugar. The excessive production over the amount fixed for home consumption was proportioned or distributed among the factories, and was identified as some specified variety of reserve or surplus sugar. Sugar from these reserves could only find its way into the home market under ordinary conditions, except on the payment of a double excise tax which was practically prohibitive. The effect was to encourage exportation of all reserve sugar. Upon exportation all excise taxes were remitted. Under the operation of a complicated system, certain assignment or transfer certificates were issued which enabled "free sugar" to be exported and an equivalent amount of "surplus sugar" to be substituted for it. The Court said, page 512 :

"It is practically admitted in this case that a bounty equal to the value of these certificates is paid by the Russian Government, and the main argument of the petitioner is addressed to the proposition that this bounty is paid not upon exportation but upon production."

It was the value of these certificates and not the remission of the excise which was held to constitute a bounty.

The Board concedes that "the method by which the Russian domestic tax was levied and collected *differed materially* from that of the British tax here under consideration" (Rec., 25).

An admirable summary of this case will be found in the Treasury Memorandum of 1911 hereinbefore referred to. We print it in full (Rec., 62) :

"In determining the question whether or not a countervailing duty shall be assessed upon spirits manufactured in Great Britain and imported from there to this country, the principal facts to be taken into consideration are :

"First, the fact that Great Britain has a fiscal policy not only of free trade, but also of a lack of artificial stimulus to trade such as is produced by bounties.

"Second, that the allowance of 3d. a gallon authorized by Section 3 of the Act of 48 and 49 Victoria, chapter 51, is an allowance made, as expressly stated in the preceding similar act (Section 4 of the Act of 23 and 24 Victoria, page 29, 'In consideration of the loss and hindrance caused by the excise regulations in the distillation and rectification of spirits in the United Kingdom.'

"Third, That from the evidence produced in the form of sworn statements of distillers and rectifiers and other evidence produced by the British Government, it appears that the allowance is not in excess of the actual loss and hindrance caused by the excise regulations.

"FOURTH. The fact that there is a greater amount of duty assessed per gallon upon imported spirits into Great Britain than there is assessed as excise upon domestic manufactured spirits in Great Britain, thus clearly indicating that the domestic distiller or rectifier is protected against competition at home; and not merely protected by the allowance in question against competition in his export trade.

" FIFTH. The fact that the British Revenue Act of August 6, 1906, Part 1, Section 1, provides that

" ' Where any spirits are used by an authorized methylator for making industrial methylated spirits, or are received by any person for use in any art or manufacture under Section 8 of Finance Act of 1902, a like allowance shall be paid to the authorized methylator, or person by whom the spirits are received, as the case may be, in respect to those spirits as is payable on exportation of plain British spirits.'

" The effect of this act is clearly to indicate that the allowance is a *bona fide* allowance as stated in the act of 1860 and is not in any sense an export bounty.

" SIXTH. The fact that this allowance has been made since 1860 without having been acted upon by this Department at any time prior to the present investigation.

" In view of these considerations the Department has accepted the view that the allowance in question is not a bounty or grant within the meaning of Section 6 of the Tariff Act of August 5, 1909, and consequently that no countervailing duty shall be assessed upon importations of British spirits."

It is manifest—as a glance through the record will make fully apparent—that questions here in issue involve the international relations of the United States. The importance of the issue and the expediency of its review by this Court is attested by the certificate of the Attorney-General hereinbefore mentioned.

It is respectfully submitted that writs of *certiorari* should issue as prayed.

ALBERT H. WASHBURN,
Attorney for G. S. Nicholas & Co. *et al.*
W. P. PREBLE,
Attorney for Alex. D. Shaw & Co. *et al.*